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"Entry" As an Issue in Immigration Law

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Comments

"ENTRY" AS AN ISSUE IN IMMIGRATION LAW

Often the first issue a court or administrative body must address in determining the right of an alien to remain in the United States is whether the alien has made an "entry." The term means much more than simply being physically present in the country and its implications are profound. Section 101(a)(13) of the Immigration and Nationality Act sets forth the statutory definition of "entry." This Comment examines each of the elements of the statutory definition and surveys the various interpretations thereof by federal courts and the Board of Immigration Appeals.

THE SIGNIFICANCE OF "ENTRY"

One fundamental characteristic of sovereignty is that a nation may prescribe the terms and conditions by which an alien may enter that nation.[1] An alien has no *right* to enter the United States unless Congress[2] grants it to him;[3] he has no constitutional rights regarding his application for entry.[4] However, once the alien has made an "entry" into the United States, his status changes and he is afforded

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1. [It is an] accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe . . . .

United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904). *See also* United States v. Ju Toy, 198 U.S. 253, 261 (1905); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

2. "The establishment of requirements for entry into the United States is a political decision which rests with Congress." Fleurinor v. INS, 585 F.2d 129, 134 n. 3 (5th Cir. 1978). *See also* Grubisich v. Esperdy, 175 F. Supp. 445, 450 (S.D.N.Y. 1959).

3. United States *ex rel.* Polymeris v. Trudell, 284 U.S. 279, 280-81 (1932) (Holmes, J.). *Accord* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). Even a returning alien has no unconditional right to re-enter. *See, e.g.*, Polymeris v. Trudell, 284 U.S. at 281. Similarly, no right to enter exists even though an alien has secured a visa or re-entry permit from immigration officials prior to presenting himself for inspection at the border. 8 U.S.C. §§ 1201(h), 1203(e) (1982); Hofstein, *The Returning Resident Alien*, 10 N.Y.U. INTRA. L. REV. 271, 278 (1955).

4. Landon v. Plasencia, 103 S. Ct. 321, 329 (1982); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953).

constitutional protections accordingly.[5]

"Entry" into the United States also determines the applicability of numerous statutory provisions of the Immigration and Nationality Act (hereinafter referred to as "the INA" or "the Act"),[6] most importantly, the provisions relating to exclusion and expulsion of aliens. One court recently summarized the statutory importance of an "entry" as follows:

> [T]he immigration laws have long made a distinction between those aliens who have come to the United States seeking admission and those "in" the United States after an "entry," irrespective of its legality. The Immigration and Nationality Act preserves the distinction. Those seeking admission are subjected to "exclusion proceedings" to determine whether they "shall be allowed to enter or shall be excluded and deported." Aliens once they have made an "entry" are subject to "expulsion" if they fall within those categories of aliens who may be "deported" by the Attorney General. Proceedings for expulsion are commonly referred to as "deportation proceedings."[7]

Deportation, although not criminal punishment, can amount to banishment or exile for one who has been in the country long enough to establish a home, job, or family.[8] Consequently, under the INA, aliens who have "entered" the United States have greater procedural and substantive rights than those who have not "entered."[9]

An entrant alien in expulsion proceedings is entitled to prior notice, the right to counsel, the right to present evidence, and other safeguards under section 242(a) of the Act.[10] He is also entitled to certain bond redetermination,[11] venue,[12] and appeal process[13] advan-

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5. *See, e.g.*, Landon v. Plasencia, 103 S. Ct. 321, 329 (1982); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 291 (1904); *In re* Phelisna, 551 F. Supp. 960, 962 (E.D.N.Y. 1983).

6. 8 U.S.C. §§ 1101-1525 (1982). The INA was enacted in 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), and, "though frequently amended since [then], remains the basic format of the immigration laws [today]." Reid v. INS, 420 U.S. 619, 621 (1975).

7. *In re* Phelisna, 551 F. Supp. 960, 962 (E.D.N.Y. 1983) (citations omitted). *See also* Landon v. Plasencia, 103 S. Ct. 321 (1982); Leng May Ma v. Barber, 357 U.S. 185, 187 (1958); United States *ex rel.* Lam Fo Sang v. Esperdy, 210 F. Supp. 786, 788 (S.D.N.Y. 1962). The term "deportation" is "frequently used loosely to describe the physical departure of an alien from the United States under both a deportation order and an exclusion order." United States *ex rel.* Lue Chow Yee v. Shaughnessy, 146 F. Supp. 3, 5 (S.D.N.Y. 1956), *aff'd*, 245 F.2d 874 (2d Cir. 1957). However, in this Comment, unless the context indicates otherwise, "deportation" will refer to expulsion of aliens who have made an "entry" into the United States.

8. Bridges v. Wixon, 326 U.S. 135, 147 (1945).

9. Leng May Ma v. Barber, 357 U.S. 185, 187 (1958); Maldonado-Sandoval v. INS, 518 F.2d 278, 280 n.3 (9th Cir. 1975).

10. 8 U.S.C. § 1252(b) (1982).

11. Section 242(a) of the Act authorizes the Attorney General to release an alien on bond pending deportation proceedings. 8 U.S.C. § 1252(a) (1982). Regulations promulgated under this section permit immigration judges to review the amount of the original bond and reduce it in appropriate cases. 8 C.F.R. § 1252.2(b) (1983).

12. A deportation proceeding is usually held near the alien's residence within the United States, while exclusion proceedings are usually held at the port of entry. Landon v. Plasencia, 103 S. Ct. 321, 325 (1982) (citing 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.6c (1981)).

13. After exhausting his administrative remedies, an alien who is subject to depor-

tages. These rights are denied to a non-entrant alien under the more limited exclusion hearing procedures of sections 236(a) and (b) of the Act.[14]

A deportable alien also has several substantive rights which are denied to an excludable alien.[15] He may be allowed to depart from the United States voluntarily;[16] he may be allowed to designate the country to which he will be deported;[17] and he may seek discretionary suspension of deportation[18] or a stay of deportation.[19]

"Entry" is also important because it determines the basic applicability of the INA's deportation provisions. Section 241(a) of the INA[20] lists nineteen classes of deportable aliens. Membership in each class is determined either at the time of "entry" or at some limited or unlimited time thereafter.[21] Section 212(a) of the

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tation proceedings may appeal the final order of deportation directly to the court of appeals. 8 U.S.C. § 1105a(a) (1982). An alien who is subject to exclusion proceedings must petition the district court for a writ of habeas corpus. 8 U.S.C. § 1105a(b) (1982).

14. 8 U.S.C. § 1226(a), (b) (1982). A non-entrant alien may even be denied a hearing if the Attorney General determines that national security is involved. 8 U.S.C. § 1225(c) (1982). *See* United States *ex rel.* Lam Fo Sang v. Esperdy, 210 F. Supp. 786, 788 (S.D.N.Y. 1962).

15. *In re* Phelisna, 551 F. Supp. 960, 962 (E.D.N.Y. 1983).

16. 8 U.S.C. § 1254(e) (1982).

17. 8 U.S.C. § 1253(a) (1982). *See* United States *ex rel.* Camezon v. District Director of INS, 105 F. Supp. 32, 38 (S.D.N.Y. 1952).

18. 8 U.S.C. § 1252(e) (1982).

19. 8 U.S.C. § 1253(h) (1982). *See* Leng May Ma v. Barber, 357 U.S. 185, 189-90 (1958); *In re* Cenatice, 16 I. & N. Dec. 162, 164 (1977); *In re* Pierre, 14 I. & N. Dec. 467, 470 (1973).

An alien may wish to be excluded rather than expelled, notwithstanding the additional rights available to him in expulsion proceedings. He would then seek to show that he did *not* make an "entry." *See, e.g.*, Cheng v. INS, 534 F.2d 1018, 1019 (2d Cir. 1976); *In re* Sanchez, 17 I. & N. Dec. 218, 220 (1980); *In re* Yam, 16 I. & N. Dec. 535, 536-37 (1978). Such a claim might be made because an alien who is excluded may reapply for admission after one year without the permission of the Attorney General; an alien who is expelled, however, must wait five years to reapply without such permission. 8 U.S.C. § 1182(a)(16), (17) (1982). *See* Landon v. Plasencia, 103 S. Ct. 321, 326 n.4 (1982); Vitale v. INS, 463 F.2d 579, 580 (7th Cir. 1972); Solis-Davila v. INS, 456 F.2d 424, 427-28 (5th Cir. 1972).

20. 8 U.S.C. § 1251(a) (1982).

21. For example, an alien is deportable if he *entered* the United States without inspection. 8 U.S.C. § 1251(a)(2) (1982). *See, e.g.*, Plyler v. Doe, 457 U.S. 202, *reh'g denied*, 103 S. Ct. 14 (1982); Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978); Hernandez-Almanza v. INS, 547 F.2d 100 (9th Cir. 1976); *In re* Ruis, I.D. No. 2923 (BIA 1982).

An alien is also deportable if *within five years after entry* he is convicted of a crime involving moral turpitude. 8 U.S.C. § 1251(a)(4) (1982). *See, e.g.*, Munoz-Casarez v.

INA[22] similarly lists thirty-three classes of excludable aliens. Section 241(a)(1)[23] provides that an alien is *deportable* if "at the time of entry [he] was within one or more of the classes of aliens *excludable* by the law existing at the time of such entry."[24] Not only is an alien excludable for belonging to any of the classes included in section 212(a); he is also deportable if, although technically excludable, he somehow succeeds in making an "entry" into the country.

The issue of "entry" may also arise under the criminal provisions of the INA, particularly those dealing with alien smuggling.[25] In this context, the "entry" of the smuggled alien rather than the "entry" of the accused is important.[26]

The above discussion illustrates that, for an alien (or for one charged with assisting the illegal "entry" of an alien), much depends on whether an "entry" has occurred. The determination of this issue is significantly more complicated than it might seem because the term "entry" has acquired a special technical meaning.[27]

INS, 511 F.2d 947 (9th Cir. 1975); Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974); *In re* Sanchez, 17 I. & N. Dec. 218 (1980). Under this section and others providing for deportation upon the occurrence of an event some time after "entry," the alien will seek to establish that an "entry" did not occur at a particular time. The issue in these cases is not the type of proceeding to which the alien will be entitled, but whether he should be deported.

Likewise, an alien is deportable if *at any time after entry* he becomes affiliated with the Communist Party. 8 U.S.C. § 1251(a)(6)(C) (1982). *See, e.g.*, Bonetti v. Rogers, 356 U.S. 691 (1958); Bridges v. Wixon, 326 U.S. 135 (1945); United States *ex rel.* Belfrage v. Kenton, 224 F.2d 803 (2d Cir. 1955); Grubisich v. Esperdy, 175 F. Supp. 445 (S.D.N.Y. 1959).

22. 8 U.S.C. § 1182(a) (1982).

23. 8 U.S.C. § 1251(a)(1) (1982).

24. *Id.* (emphasis added).

25. 8 U.S.C. § 1324(a) (1982) provides in part:

> Any person . . . who—
> (1) brings into or lands in the United States . . . or attempts . . . to bring into or land in the United States . . .; [or]
> . . .
> (4) wilfully or knowingly encourages or induces, or attempts to encourage or induce . . . the entry into the United States of—
> any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony
> . . . .

Additionally, 18 U.S.C. § 2 (1982), in conjunction with 8 U.S.C. § 1325 (1982), imposes criminal punishment as a principal on one who aids and abets an alien in illegally entering the United States. *See* United States v. Oscar, 496 F.2d 492, 493 (9th Cir. 1974).

26. United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982). "Entry" of the illegal alien determines the proper charge against the alleged smuggler. For example, under 18 U.S.C. § 2 (1982) and 8 U.S.C. § 1325 (1982), the government must prove the actual "entry" of the smuggled alien to obtain a conviction. However, under 8 U.S.C. § 1324(a)(1) (1982) and 8 U.S.C. § 1324(a)(4) (1982), the government need only show an attempt at or inducement of "entry." *E.g.*, United States v. Zayas-Morales, 685 F.2d at 1275; United States v. Hanna, 639 F.2d 194, 196 (5th Cir. 1981).

27. Barber v. Gonzales, 347 U.S. 637, 641 (1954).

THE BASIC DEFINITION OF "ENTRY"

No statutory definition of "entry" existed prior to 1952.[28] Therefore, in early cases dealing with the exclusion, deportation, and criminal provisions of the immigration laws which used the term "entry," courts were required to develop a judicial interpretation. The Supreme Court defined "entry" as "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one."[29] This interpretation and subsequent judicial modifications became the basis of the statutory definition[30] set forth in section 101(a)(13) of the INA[31] which provides:

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.[32]

The Board of Immigration Appeals[33] has developed the following four-part test for determining if an "entry" has occurred:

> An "entry" involves (1) a crossing into the territorial limits of the United States, i.e., physical presence; plus (2) inspection and admission by an im-

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28. Rosenberg v. Fleuti, 374 U.S. 449, 453 (1963).
29. United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 425 (1933).
30. Rosenberg v. Fleuti, 374 U.S. 449, 453-57 (1963).
31. 8 U.S.C. § 1101(a)(13) (1982).
32. *Id.* (emphasis in original). Authorities have consistently agreed that "entry" has the same meaning in all immigration law contexts. Referring to the statutory definition, the court in United States v. Oscar, 496 F.2d 492 (9th Cir. 1974), noted that "[i]t is unlikely that Congress would define a term in § 1101 [section 101] for use throughout Chapter 12 [the INA] if it intended the term to have different meanings in different sections of the chapter." *Id.* at 494. *Accord* United States v. Kavazanjian, 623 F.2d 730, 737 n.13 (1st Cir. 1980). *Cf.* Note, *Administrative Law—Status of Alien—Paroled Alien Is Not Within the United States*, 27 GEO. WASH. L. REV. 373, 375-77 (1959), which suggests that the meaning of the phrase "within the United States," often equated with "entry," should vary depending on what an alien seeks.
33. The Board of Immigration Appeals was created under regulations promulgated by the Attorney General. It is a quasi-judicial body with exclusively appellate functions and is entirely separate from the Immigration and Naturalization Service. Appeals to the Board may be taken from, *inter alia*, decisions of immigration judges in exclusion and expulsion cases. Selected decisions of the Board are designated by the Board as precedents to be followed in all future cases. 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 1.10a-1.10c (1983). In this Comment, references to decisions by "the courts" include Board decisions because of their precedential significance.

migration officer; *or* (3) actual and intentional evasion of inspection at the nearest inspection point; *coupled with* (4) freedom from restraint.[34]

The following discussion will combine a phrase-by-phrase analysis of the statutory definition of "entry" with an examination of the four parts of this formula.

ELEMENTS OF THE STATUTORY DEFINITION

"Any Coming of an Alien"

In the earliest immigration statutes, Congress probably intended the term "entry" to refer to an alien's first arrival in the United States.[35] However, the Supreme Court long ago concluded that the provisions of the immigration laws were intended to apply to *any* entry by an alien, regardless of a previous "entry" or residence in the United States.[36] This "re-entry" rule is particularly important in cases where the government seeks to deport an alien under section 241(a) of the INA[37] for committing a particular act or acquiring a particular status within five years after "entry."[38] Under that section, the five-year period begins to run from the latest "entry," not necessarily the original "entry."[39]

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34. *In re* Pierre, 14 I. & N. Dec. 467, 468 (1973) (citations omitted) (emphasis in original). The Board has consistently applied this formula in determining the issue of "entry." *See In re* Lin, I.D. No. 2900 (BIA 1982); *In re* Yam, 16 I. & N. Dec. 535, 536 (1978); *In re* Cenatice, 16 I. & N. Dec. 162, 165 (1977). *See also* Cheng v. INS, 534 F.2d 1018, 1019 (2d Cir. 1976) (reference to the *Pierre* formula by a court of appeals).

35. Gordon, *When Does an Alien Enter the United States?*, 9 FED. B.J. 248, 249 (1948). Clearly, an alien arriving in the United States for the first time may be attempting an "entry" and will be subject to exclusion or deportation proceedings, depending on his success in making the "entry." Recent Developments, *Requirement of Entry in Excluding Aliens Without a Hearing*, 53 COLUM. L. REV. 872, 873 (1953). The following are representative of the many cases which discuss an alien's initial attempt to "enter." Leng May Ma v. Barber, 357 U.S. 185 (1958); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); United States v. Ju Toy, 198 U.S. 253 (1905); Cheng v. INS, 534 F.2d 1018 (2d Cir. 1976); United States *ex rel.* Ling Yee Suey v. Spar, 149 F.2d 881 (2d Cir. 1945); *In re* Phelisna, 551 F. Supp. 960 (E.D.N.Y. 1983); United States *ex rel.* Lam Fo Sang v. Esperdy, 210 F. Supp. 786 (S.D.N.Y. 1962).

36. Lapina v. Williams, 232 U.S. 78, 91 (1914). The Court reaffirmed this position many times, most notably in United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933). *See supra* text accompanying note 29. *See also* Lewis v. Frick, 233 U.S. 291, 296-97 (1914); Taguchi v. Carr, 62 F.2d 307, 308 (9th Cir. 1932).

37. 8 U.S.C. § 1251(a) (1982).

38. *See, e.g.*, 8 U.S.C. §§ 1251(a) (1982) (institutionalization at public expense for a mental disease or defect) *id.* at (3); (conviction of a crime of moral turpitude) *id.* at (4); (becoming a public charge) *id.* at (8); (aiding and abetting illegal entry of aliens) *id.* at (13); (conviction for failure to register as an alien) *id.* at (15).

39. Review Note, *Immigration and Nationality—Meaning of "Entry" Under Immigration and Nationality Act—Status of Territory Under United States Trusteeship*, 32 TUL. L. REV. 778, 779 (1958) [hereinafter cited as Note, *Status of Territory*]; Note, *The Meaning of "Entry" in the Immigration Law*, 7 LAW. GUILD REV. 265 (1947) [hereinafter cited as Note, *Meaning of "Entry"*]. For example, where an alien first "entered" in 1956, departed and "re-entered" in 1969, and was convicted in 1970 of voluntary manslaughter, a crime involving moral turpitude, he was deportable under section

Although "entry" refers to both an original "entry" and a "re-entry," the acts which constitute "re-entry" may vary with the status of the alien. A lawful permanent resident alien[40] may, under certain circumstances, depart from and return to the United States without being subjected to the consequences of an "entry."[41] Other aliens, however, are deemed to make an "entry" upon each return.

It should be noted that the terms "entry" and "lawful admission" are not synonymous.[42] "Entry" applies to both legal and illegal entries into the United States.[43] Illegal entry can be accomplished in a variety of ways but, if apprehended, the alien is always subject to deportation because he has made an "entry."[44]

241(a)(4) of the Act, (8 U.S.C. § 1251(a)(4) (1982)). Munoz-Casarez v. INS, 511 F.2d 947 (9th Cir. 1975). *See also* Annello *ex rel.* Annello v. Ward, 8 F. Supp. 797 (D. Mass. 1934). The alien would not have been deportable if he had not "re-entered" in 1969 because the conviction took place more than five years after his original "entry." *See* United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 426 (1933). *See also* Hofstein, *supra* note 3, at 278. His "re-entry" subjected him to the provisions of section 241(a)(4) as if he had never previously resided in the United States.

40. "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20) (1982). An alien may be admitted to the country as a lawful permanent resident, 8 U.S.C. §§ 1151-1154 (1982) or he may have his status adjusted to that of a lawful permanent resident after he has entered the country. 8 U.S.C. §§ 1255, 1255b (1982).

41. The statutory definition of "entry" contains an exception clause which pertains to the return of lawful permanent resident aliens. *See supra* text accompanying note 32. This clause has been the subject of extensive judicial construction. *See infra* notes 138-182 and accompanying text.

42. *In re* Chow, 146 F. Supp. 487, 490 (S.D.N.Y. 1956).

43. Section 241(a)(2) of the Act specifically provides for the deportation of aliens who "enter" the United States without inspection or are in the country in violation of any law of the United States. 8 U.S.C. § 1251(a)(2) (1982). "The clear objective of this section is to protect the integrity of the boundaries of the United States by requiring every alien to submit to inspection by immigration officials each time he enters this country." *In re* Ruis, I.D. No. 2923 (BIA 1982).

44. *See* Plyler v. Doe, 457 U.S. 202, *reh'g denied*, 103 S. Ct. 14 (1982) (dictum); Reid v. INS, 420 U.S. 619 (1975) (false claim of citizenship); Hernandez-Almanza v. INS, 547 F.2d 100 (9th Cir. 1976) (crossing border at a location not designated as a port of entry); Cacho v. INS, 547 F.2d 1057 (9th Cir. 1976) (fraudulent misrepresentations used to secure admission); Bufalino v. INS, 473 F.2d 728 (3d Cir.), *cert. denied*, 412 U.S. 928 (1973) (false claim of citizenship); Lazarescu v. United States, 199 F.2d 898 (4th Cir. 1952) (fraudulent concealment of prior deportation); United States *ex rel.* Shirrmeister v. Watkins, 171 F.2d 858 (2d Cir.), *cert. denied*, 337 U.S. 942 (1949) (refusal to depart after being given opportunity to do so); United States *ex rel.* Anderson v. Karnuth, 46 F.2d 689 (W.D.N.Y. 1930) (overstay after expiration of temporary permit); *In re* Lewiston-Queenston Bridge, 17 I. & N. Dec. 410 (1980) (crossing after exclusion); *In re* A—, 9 I. & N. Dec. 356 (1961) (escape from detention). *See generally* Gordon, *supra* note 35. See *infra* notes 94-124 and accompanying text for a discussion of the voluntary or involuntary nature of an alien's "entry."

"Into the United States"

To make an "entry," an alien must cross into the territorial limits of the United States; he must be physically present within the country's borders.[45] Because this requirement is usually susceptible to precise measurement,[46] it is seldom an issue.[47] A more important consideration under this portion of the definition of "entry" is the distinction made between mere physical presence and physical presence coupled with freedom from official restraint.[48] Merely crossing the international border does not necessarily constitute "entry."[49] Rather, when an alien is detained pending determination of his right to enter, he is regarded as "stopped at the limit of our jurisdiction" although he is physically within the borders of the United States.[50] This fiction of being stopped at the border has been consistently followed, the rationale being that while the alien is subject to official restraint or custody he has not been admitted into the United States and has therefore not made an "entry."[51]

Of course, in addition to bearing the consequences of having made an "entry," the illegal entrant is also entitled to the rights and protections available in deportation proceedings. *See supra* notes 10-19 and accompanying text. *See also* United States *ex rel.* Lam Fo Sang v. Esperdy, 210 F. Supp. 786, 790 (S.D.N.Y. 1962); *In re* Estrada-Betancourt, 12 I. & N. Dec. 191 (1967).

45. *See supra* text accompanying note 34.

46. Gordon, *supra* note 35, at 248.

47. One Board of Immigration Appeals decision does illustrate a potential problem. In *In re* Barreto, 15 I. & N. Dec. 498 (1975), an alien submitted to pre-flight inspection by a United States immigration officer in Toronto, Canada. Initially the officer stamped the alien's passport and visa approving admission into the United States, but, before the airline flight departed, the officer crossed out the admission stamps, having become suspicious of the alien's grounds for admission. Pursuant to the instructions of the immigration officer, the alien reported to the Chicago immigration office upon her arrival in the United States and was placed in exclusion (rather than deportation) proceedings. The Board found that exclusion proceedings were appropriate because the alien had not achieved physical presence within the geographical boundaries of the United States when the admission stamps were cancelled and therefore had not effected an "entry." *Id.* at 500. Presumably, if the alien had been physically present within the United States when admission was approved, her right to remain in the country could have been questioned only in deportation proceedings because she would have effected an "entry." *See In re* V—Q—, 9 I. & N. Dec. 78 (1960). Barreto's subsequent physical presence did not constitute an "entry" because she was never free of official restraint. *See infra* notes 48-71 and accompanying text.

48. *See supra* text accompanying note 34.

49. *See, e.g.*, United States v. Ju Toy, 198 U.S. 253 (1905) (Holmes, J.) (an alien who arrived in the United States but was detained aboard his ship pursuant to orders of an immigration officer had not made an "entry").

50. *Id.* at 263.

51. *See* Kaplan v. Tod, 267 U.S. 228, 230 (1925) (harborage at Ellis Island); United States v. Oscar, 496 F.2d 492, 493 (9th Cir. 1974) (direction to secondary inspection area for further investigation); United States v. Vasilatos, 209 F.2d 195, 197 (3d Cir. 1954) (detention on board ship); *In re* Cenatice, 16 I. & N. Dec. 162, 165 (1977) (detention on board ship and at alien detention facility); *In re* Pierre, 14 I. & N. Dec. 467, 469 (1973) (detention on board ship). The enactment of the statutory definition of "entry" in 1952 did not affect judicial interpretation of the term regarding free-

Such a rule is necessary in a practical sense because most of the designated ports of entry are some distance inside the borders of the United States.[52] However, physical presence within the confines of a port of entry does not necessarily connote physical restraint. An alien's physical presence may be accompanied by freedom from restraint and result in an "entry" even though the two elements coincide at a port of entry.[53]

Apparently neither the length nor the timing of an alien's detention affects his status as a non-entrant. The determination of an alien's right to enter may take months or years.[54] An alien is deemed to enjoy only a "temporary haven" in the United States during this time and any delays which occur as a result of his efforts to gain admission do not elevate his position to that of an entrant.[55] Additionally, the Supreme Court has held that detention of an alien after an order of exclusion has been rendered does not result in "entry" of the alien.[56]

To be deemed subject to official restraint, an alien need not be in the actual physical custody of the Immigration and Naturalization Service (hereinafter referred to as "the Service"). He may instead be held in "constructive custody" which can take at least two forms.

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dom from official restraint. *In re* Dubbiosi, 191 F. Supp. 65, 66 (E.D. Va. 1961).

52. [I]n a literal and physical sense a person coming from abroad enters the United States whenever he reaches any land, water or air space within the territorial limits of this nation. But the actual clearance of persons who seek admission in regular course is accomplished at designated stations, many of them located as a matter of convenience some distance inside the national boundary. In these circumstances, those who have come from abroad directly to such a station seeking admission in regular course have not been viewed by the courts as accomplishing an "entry" by crossing the national boundary in transit or even by arrival at a port so long as they are detained there pending formal disposition of their requests for admission.

United States v. Vasilatos, 209 F.2d 195, 197 (3d Cir. 1954). *Accord In re* Phelisna, 551 F. Supp. 960, 962 (E.D.N.Y. 1983).

53. For example, in United States v. Martin-Plascencia, 532 F.2d 1316, 1317 (9th Cir.), *cert. denied*, 429 U.S. 894 (1976), the court held that an adolescent alien who had crawled through an opening in a border fence into the premises of a port of entry *had* made an "entry" because he was never subject to any type of official restraint.

54. In *In re* Cenatice, 16 I. & N. Dec. 162 (1977), aliens who arrived from Haiti were detained on board their boat and later at an alien detention facility for approximately eleven months prior to a determination of excludability. And in United States *ex rel.* Tom We Shung v. Murff, 176 F. Supp. 253 (S.D.N.Y. 1959), *aff'd*, 274 F.2d 667 (2d Cir. 1960), determination on an alien's application for admission was pending for eleven years.

55. United States *ex rel.* Tom We Shung v. Murff, 176 F. Supp. 253, 259 (S.D.N.Y. 1959). *See also In re* Milanovic, 162 F. Supp. 890 (S.D.N.Y. 1957), *aff'd*, 253 F.2d 941 (2d Cir. 1958) (determination of status pending for seven years).

56. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953).

First, the Service may entrust the alien to another person or entity who physically detains him. For example, an alien who is brought to the United States by a carrier must be held by the carrier until the alien's admissibility is determined.[57] While so detained, the alien is considered subject to official restraint and is therefore a non-entrant. The same is true when the Service entrusts an alien to a social service agency.[58] Additionally, detention by non-immigration law enforcement officers constitutes constructive custody when they apprehend an alien at the border and hold him for transfer to the Service.[59]

The second form of constructive custody does not involve actual physical detention. An alien who has come into Service custody prior to effecting an "entry" and who is released on bond while awaiting either determination of his right to enter the United States or transportation out of the country after exclusion, is in the constructive custody of the Service.[60] Additionally, section 212(d)(5)(A) of the INA[61] allows the Attorney General to temporarily "parole" an alien into the United States while the alien's right to lawfully enter the country is determined. Constructive custody in the form of parole, like actual custody of an alien pending determination of his admissibility, does not constitute an "entry."[62]

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57. *See, e.g.*, United States v. Kavazanjian, 623 F.2d 730 (1st Cir. 1980); Vitale v. INS, 463 F.2d 579 (7th Cir. 1972); United States *ex rel.* Lam Fo Sang v. Esperdy, 210 F. Supp. 786 (S.D.N.Y. 1962) (all relating to custody of the alien by an airline).

One administrative device used to permit an alien to physically come into the United States without making an "entry" is the "transit without visa" or "TRWOV." *See* 8 U.S.C. §§ 1182(d)(4)(C), 1228(d) (1982). The court in United States v. Kavazanjian, 623 F.2d 730, 732 (1st Cir. 1980), explained that this device is designed to facilitate international travel by permitting an alien to stop in the United States on his way from one foreign country to another without a passport or visa. The alien's transportation line must hold him in its custody at all times while he is physically present in the United States. 8 C.F.R. § 214.2(c)(1) (1983). He is therefore a non-entrant because he is not free of official restraint and is deemed stopped at the border. 623 F.2d at 737. *See also* Vitale v. INS, 463 F.2d 579 (7th Cir. 1972); Putrus v. Montgomery, 555 F. Supp. 452 (E.D. Mich. 1982); United States *ex rel.* Lam Fo Sang v. Esperdy, 210 F. Supp. 786 (S.D.N.Y. 1962).

58. *See* Kaplan v. Tod, 267 U.S. 228 (1925) (custody entrusted to the Hebrew Sheltering and Immigrant Aid Society after determination of excludability); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (detention in a mission house pending determination of right to enter).

59. Klapholz v. Esperdy, 302 F.2d 928, 929 (2d Cir.), *cert. denied*, 371 U.S. 891 (1962) (detention by United States Marshal); *In re* Yam, 16 I. & N. Dec. 535, 536-37 (1978) (detention by local police).

60. *See* Arias v. Rogers, 676 F.2d 1139 (7th Cir. 1982) (release on bond pending habeas corpus proceedings); Ng Lin Chong v. McGrath, 202 F.2d 316 (D.C. Cir. 1952) (release on bond while awaiting transportation out of the country); United States *ex rel.* Pantano v. Corsi, 65 F.2d 322 (2d Cir. 1933) (release on bail during pendency of criminal proceedings); *In re* Phelisna, 551 F. Supp. 960 (E.D.N.Y. 1983) (release during habeas corpus proceedings).

61. 8 U.S.C. § 1182(d)(5)(A) (1982).

62. Leng May Ma v. Barber, 357 U.S. 185 (1958). Section 212(d)(5)(A) specifi-

An alien might also be considered under constructive restraint although not in physical custody when he is observed attempting to enter the country illegally. Earlier cases held that an alien who was under constant surveillance immediately before, during, and after crossing the border had not made an "entry."[63] However, recent decisions suggest that an alien *may* make an "entry" even though Service officers observe him surreptitiously crossing the border.[64] These cases do not specifically repudiate the earlier decisions. Rather, they simply conclude that an "entry" has occurred under these circumstances without discussing whether the observation amounts to constructive restraint. Whether constant observation of an alien making a surreptitious crossing amounts to constructive restraint appears to be unsettled.

An alien is generally deemed to have effected an "entry" upon his release from custody because he is then free from any legal re-

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cally provides that "parole . . . shall not be regarded as an admission of the alien." 8 U.S.C. § 1182(d)(5)(A) (1982). That section goes on to provide that:

> when the purposes of such parole shall . . . have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Id. In *Leng May Ma*, the Court observed that parole is "simply a device through which needless confinement is avoided" and was "never intended to affect an alien's status." 357 U.S. at 190. *Accord* Rogers v. Quan, 357 U.S. 193 (1958) (companion case). The Court further observed that "[p]hysical detention of aliens is . . . generally employed only as to security risks or those likely to abscond." 357 U.S. at 190. For an analysis of *Leng May Ma* see Note, *supra* note 32.

Lower courts and the Board of Immigration Appeals have consistently followed the holding in *Leng May Ma. E.g.*, United States v. Kavazanjian, 623 F.2d 730, 731 (1st Cir. 1980); Siu Fung Luk v. Rosenberg, 409 F.2d 555, 558 (9th Cir. 1969); Wong Hing Fun v. Esperdy, 335 F.2d 656, 657 (2d Cir. 1964), *cert. denied sub nom.* Ng Sui Sang v. Esperdy, 379 U.S. 970 (1965); *In re* Hinojosa, 17 I. & N. Dec. 322, 323 (1980).

63. *E.g., Ex parte* Chow Chok, 161 F. 627 (N.D.N.Y.), *aff'd*, 163 F. 1021 (2d Cir. 1908).

64. In Laredo-Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977), the court found that a lawful permanent resident alien who was observed crossing the border had made an "entry." If *Ex parte* Chow Chok, 161 F. 627 (N.D.N.Y.), *aff'd*, 163 F. 1021 (2d Cir. 1908), were controlling precedent, the court should have found that the alien had *not* made an "entry." *See supra* note 63 and accompanying text. The Second Circuit Court of Appeals in Cheng v. INS, 534 F.2d 1018, 1019 (2d Cir. 1976), noted that *Chow Chok*, interpreted a predecessor statute to the current INA and did not control interpretation of the definition of "entry" found in 8 U.S.C. § 1101(a)(13) (1982). That court, however, was able to distinguish *Chow Chok*. In *Cheng*, a group of aliens had crossed the border and traveled four-tenths of a mile into the United States before being observed by a border patrol agent. Because there was no actual or constructive restraint over the aliens for at least a short time after they crossed the border, the court found that the aliens had "entered" the United States. 534 F.2d at 1019.

straints imposed by the immigration laws.[65] However, revocation of parole does not necessarily result in an "entry." Even prolonged inaction by the Service after revoking an alien's parole does not affect the alien's status as a non-entrant.[66]

Escape from actual or constructive custody may be held to be an "entry," albeit an illegal "entry." Courts have refused to extend the "fiction" of constructive custody to the situation where an alien escapes from Service custody after issuance of an exclusion order[67] or while in transit from one foreign country to another.[68] The rationale is that such an alien is in the same position as one who crosses the border surreptitiously.[69] However, the Board of Immigration Appeals apparently makes a distinction between those cases where exclusion proceedings are pending and those where the alien's status or admissibility is settled. The Board has held that after a notice that exclusion proceedings will be held has been served on a detained alien, his subsequent escape does not elevate his status to that of an entrant.[70] The rationale behind this position is that after the notice is served, authority over the alien continues until excludability has been determined, regardless of the alien's escape.[71]

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65. *In re* Sanchez, 17 I. & N. Dec. 218, 220-21 (1980). *See also In re* A—, 9 I. & N. Dec. 356 (1961), and cases cited therein.

66. Siu Fung Luk v. Rosenberg, 409 F.2d 555, 558 (9th Cir. 1969). In that case, after finding an alien excludable, the Service temporarily paroled him into the United States while he awaited arrangements for his transportation out of the country. Parole was revoked after approximately four months but transportation arrangements were not completed until nearly twenty months later. The court held that this delay, like delay in determining an alien's right to enter, did not result in an "entry." *Id.*

67. United States *ex rel.* La Barbera v. Commissioner, 61 F.2d 573, 574 (2d Cir. 1932) (Hand, J.).

68. United States *ex rel.* Lam Fo Sang v. Esperdy, 210 F. Supp. 786, 790 (S.D.N.Y. 1962).

69. United States *ex rel.* La Barbera v. Commissioner 61 F.2d 573, 574 (2d Cir. 1932) (such an alien is no different from one who "entered by stealth and secreted himself" for a period of time); United States *ex rel.* Lam Fo Sang v. Esperdy, 210 F. Supp. 786, 790 (S.D.N.Y. 1962) (alien who escaped from custody of an airline while in transit from one foreign country to another "was no different from that of a seaman who had jumped ship or a 'wetback' who entered the United States by swimming the Rio Grande"). *Accord* United States v. Kavazanjian, 623 F.2d 730, 739 (1st Cir. 1980).

70. *In re* Lin, I.D. No. 2900 (BIA 1982).

71. *Id.* Previously the Board had held that an alien who escaped from his ship after the Service had ordered that he be detained effected an "entry." *In re* A—, 9 I. & N. Dec. 356, 358 (1961). In an attempt to reconcile its holding in *Lin* with *In re* A—, the Board stated the following:

> Whether the applicant is . . . paroled into the United States or . . . kept in detention at a Service facility [after service of the notice] is not determinative. His escaping from Service detention does not place him in the same status as an alien who manages to evade inspection by entering the United States surreptitiously. He has been inspected but not admitted. We therefore, do not choose to extend our decision in [*In re* A—] to aliens physically in this country, who are detained pending exclusion proceedings, and who manage to escape from detention.

In re Lin, I.D. No. 2900 (BIA 1982). The Board's reasoning is difficult to reconcile with

An alien's place of "entry" for venue purposes is generally wherever his physical presence within the United States coincides with freedom from official restraint. He is considered free from official restraint when the Service grants him permission to "enter," regardless of whether he chooses to remain at his site of detention.[72]

Courts have made a distinction between the terms "entry" and "landing." Like "entry," the term "landing" is a word of art, with its own technical meaning.[73] "Landing" is a broader concept than "entry" in that once physical presence occurs, the landing is ordinarily complete.[74] "Landing" therefore does not require freedom from official restraint.[75]

"From a Foreign Port or Place or From an Outlying Possession"

In addition to requiring physical presence and freedom from official restraint, "entry" necessarily contemplates an arrival from some point outside the country.[76] Definitional provisions of the INA aid in the determination of what constitutes coming "from a foreign port or place." The term "United States," when used in a geographical sense, is defined in section 101(a)(38) of the INA[77] as "the continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands of the United States."[78] "Foreign state" as defined in section 101(a)(14)[79] "includes outlying possessions of a foreign state,

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the holding in United States *ex rel.* La Barbera v. Commissioner, 61 F.2d 573 (2d Cir. 1932). *See supra* notes 67-69 and accompanying text. The only factual difference between *Lin* and *La Barbera* is that the alien in *La Barbera* had already been ordered excluded while the alien in *Lin* was awaiting disposition of his application for admission.

72. *See* United States v. Vasilatos, 209 F.2d 195, 197 (3d Cir. 1954); Lazarescu v. United States, 199 F.2d 898, 899-901 (4th Cir. 1952). In both of these cases, an alien crewman was given permission to "enter" at one port but chose to remain on board his ship until it reached the next port. Proper venue for deportation proceedings was at the first port where freedom from official restraint was coupled with physical presence.

73. *In re* Lewiston-Queenston Bridge, 17 I. & N. Dec. 410, 412-13 (1980).

74. *Id.*

75. The distinction between "landing" and "entry" was illustrated in *In re* Lewiston-Queenston Bridge, 17 I. & N. Dec. 410 (1980). In that case the owner of an international bridge was charged with violating section 271(a) of the INA. 8 U.S.C. § 1321(a) (1982). That section imposes penalties on transportation facilities which bring aliens to the United States and fail to prevent them from "landing" at a place other than one officially designated as a port of entry. The Board of Immigration Appeals held that imposition of a penalty on a transportation facility is inappropriate when an alien makes a "landing" at a port of entry but somehow manages to effect an illegal "entry." 17 I. & N. Dec. at 413.

76. United States *ex rel.* Claussen v. Day, 279 U.S. 398, 401 (1929).

77. 8 U.S.C. § 1101(a)(38) (1982).

78. *Id.*

79. 8 U.S.C. § 1101(a)(14) (1982).

but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states."[80] And section 101(a)(29)[81] defines "outlying possessions of the United States" as "American Samoa and Swains Island."[82] An alien arriving from any place not included in the definition of United States (that is, a foreign state or an outlying possession of the United States) would be making an "entry."

Section 212(d)(7) of the INA[83] injects an additional consideration into this issue. That section provides that an alien who leaves "Guam, Puerto Rico or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States" shall be excludable under certain circumstances.[84] Under this provision, aliens who have been inspected and admitted to Guam, Puerto Rico, or the Virgin Islands of the United States must submit to an additional inspection by immigration officials when they travel to any other place which is part of the United States because they are considered to be proceeding from a foreign area to the United States.[85] The purpose of section 212 (d)(7) was to prevent excludable aliens from using arrival in these insular possessions as a means of "entry" into the United States.[86] Courts have therefore held that the section does not apply to lawful permanent resident aliens who travel to and return from them.[87] Apparently, only aliens who are not lawful permanent residents of the United States make an "entry" when coming to the "United States" from an insular possession.[88]

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80. *Id. See* Aradanas v. Hogan, 155 F. Supp. 546, 547-48 (D. Hawaii 1957) (trust territory is a foreign state). *See also* Note, *Status of Territory*, *supra* note 39 (analyzes *Aradanas*).

81. 8 U.S.C. § 1101(a)(29) (1982).

82. *Id.*

83. 8 U.S.C. § 1182(d)(7) (1982).

84. *Id.* See 8 U.S.C. § 1182(a) (1982) for conditions determining excludability.

85. United States *ex rel.* Alcantra v. Boyd, 222 F.2d 445, 449 (9th Cir. 1955).

86. *Id.*

87. *Id. See also* Haymes v. Brownell, 131 F. Supp. 784, 785 (D.D.C. 1955). *Cf.* United States *ex rel.* Leon v. Murff, 250 F.2d 436, 438 n.1 (2d Cir. 1957) (return of a lawful permanent resident alien from Puerto Rico is not an "entry"); United States v. Paquet, 131 F. Supp. 32, 33-34 (D. Hawaii 1955), *aff'd*, 236 F.2d 203 (9th Cir. 1956) (Wake Island is not a foreign port or place).

88. The Supreme Court considered an interesting but somewhat peculiar problem regarding coming from a foreign port or place in Barber v. Gonzales, 347 U.S. 637 (1954). The case concerned an "alien" who was born in the Philippine Islands as a national of the United States. ("National of the United States" is defined in 8 U.S.C. § 1101(a)(22) (1982) as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.") The "alien" came to the continental United States in 1930 and lived in this country continuously from that date. In 1946 the Philippine Islands received final independence from the United States, resulting in a change in status of persons born there from nationals to aliens. The Service sought to deport the alien on the basis of 1941 and 1950 convictions for crimes of moral turpitude. The Court held that the alien had never made an "entry"

In interpreting the coming "from a foreign port or place" portion of the "entry" definition, courts have created a fiction regarding the nature of vessels as United States territory. "[A]n American vessel is deemed to be a part of the territory of the state within which its home port is situated, and as such a part of the territory of the United States."[89] When an alien embarks on such a vessel at a port of the United States, goes to sea, and returns to this country without having been in any foreign port or place, his return is not an "entry."[90] In essence, the alien has never left the United States and therefore could not be coming from a foreign port or place. On the other hand, if the vessel goes into a foreign port and returns to the United States, the alien's return is an "entry."[91] This is so regardless of whether he goes ashore in the foreign port.[92] However, an alien does not make an "entry" into the United States by embarking on an American vessel *in a foreign port* because such a vessel outside the United States is not deemed to be United States territory.[93]

"Whether Voluntary or Otherwise"

Pursuant to the statutory definition, an "entry" into the United States may be accomplished by either voluntary or involuntary means. Several important considerations pertaining to the manner in which an alien attains physical presence in the United States may determine whether an "entry" has been made.

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on which a deportation order could be based because he had not come from a foreign port or place. Rather, at the time of his arrival, he was a United States national moving from an insular possession to the mainland. Having based its decision on this ground, the Court did not reach the alien's claim that he had not made an "entry" because he was not an "alien" at the time he came to this country. *Id.* at 642.

89. Weedin v. Banzo Okado, 2 F.2d 321, 322 (9th Cir. 1924) (quoting *In re* Ah Sing, 13 F. 286, 289 (9th Cir. 1882)). *Accord Ex parte* Kogi Saito, 18 F.2d 116, 118 (W.D. Wash. 1927); *Ex parte* T. Nagata, 11 F.2d 178, 179 (S.D. Cal. 1926).

90. United States *ex rel.* Claussen v. Day, 279 U.S. 398, 401 (1929) (dictum). *Accord Ex parte* Kogi Saito, 18 F.2d 116, 118 (W.D. Wash. 1927); *Ex parte* T. Nagata, 11 F.2d 178, 179 (S.D. Cal. 1926).

91. United States *ex rel.* Claussen v. Day, 279 U.S. 398, 401 (1929). *Accord* United States *ex rel.* Stapf v. Corsi, 287 U.S. 129, 132 (1932); United States v. Maisel, 183 F.2d 724, 725 (3d Cir. 1950); United States *ex rel.* Schlimmgen v. Jordon, 164 F.2d 633, 636 (7th Cir. 1947); United States *ex rel.* Roovers v. Kessler, 90 F.2d 327, 328 (5th Cir. 1937); McCandless v. United States *ex rel.* Pantoja, 44 F.2d 786, 787 (3d Cir. 1930); *Ex parte* Tatsuo Saiki, 49 F.2d 469, 470 (W.D. Wash. 1930).

92. United States *ex rel.* Stapf v. Corsi, 287 U.S. 129, 132 (1932); United States v. Maisel, 183 F.2d 724, 725 (3d Cir. 1950).

93. United States *ex rel.* Claussen v. Day, 279 U.S. 398, 401 (1929).

Voluntary Entries

An alien may voluntarily cross into the United States either by presenting himself for inspection at a designated port of entry or by evading such inspection. If the alien presents himself for inspection, he is generally not deemed to have made an "entry" until he is advised of his right to enter by immigration authorities.[94]

Permission to enter the United States may be granted to an alien in a variety of forms. Examples range from the conditional landing permit, which allows an alien to stay for only a limited period of time,[95] to lawful permanent resident status, which permits the alien to remain indefinitely.[96] However, once admission in any form has been granted, the alien has made an "entry."

An alien who submits to inspection and is admitted has not necessarily effected a *legal* "entry." If the alien obtains permission to enter by making fraudulent misrepresentations to the inspector[97] or by falsely claiming to be a United States citizen,[98] his "entry" is considered one without inspection and therefore illegal.[99] If discovered after such an "entry," the alien is deportable under section 241 (a)(2) of the INA.[100]

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94. Any delay or detention pending determination of the alien's right to enter does not elevate his status to that of an entrant. *See supra* notes 48-71 and accompanying text.

95. 8 U.S.C. § 1282 (1982). This permit allows an alien crewman to come into the United States temporarily for not more than twenty-nine days while his ship is in port. The permit differs from parole in that the alien is free from official restraint. Stanisic v. INS, 393 F.2d 539, 543 (9th Cir. 1968), *rev'd on other grounds*, 395 U.S. 62 (1969). *Cf. In re* Dubbiosi, 191 F. Supp. 65, 66 (E.D. Va. 1961) (no "entry" was made because, although a permit had been issued, the alien remained under official restraint until arrested for alien smuggling). The crewman is considered to have made an "entry" and may only be deported, not excluded, if he breaches the conditions of his admission. *See* Couto v. Shaughnessy, 218 F.2d 758 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955); United States *ex rel.* Szlajmer v. Esperdy, 188 F. Supp. 491 (S.D.N.Y. 1960).

96. *See* Cacho v. INS, 547 F.2d 1057 (9th Cir. 1976); Del Castillo v. Carr, 100 F.2d 338 (9th Cir. 1938).

97. *See* Reid v. INS, 420 U.S. 619 (1975); Bufalino v. INS, 473 F.2d 728 (3d Cir.), *cert. denied*, 412 U.S. 928 (1973); Ben Huie v. INS, 349 F.2d 1014 (9th Cir. 1965); *In re* Kolk, 11 I. & N. Dec. 103 (1965).

98. Aliens who enter as citizens, rather than as aliens, are treated substantially differently by immigration authorities. The examination to which citizens are subjected is likely to be considerably more perfunctory than that accorded aliens. . . .The net effect . . . of a person's entering . . . as an admitted alien is that the immigration authorities . . . require and obtain information and a variety of records that enable them to keep track of the alien after his entry. Since none of these requirements is applicable to citizens, an alien who enters by claiming to be a citizen has effectively put himself in a quite different position from other admitted aliens, one more comparable to that of a person who slips over the border and who has, therefore, clearly not been inspected.

Reid v. INS, 420 U.S. 619, 624-25 (1975) (quoting Goon Mee Heung v. INS, 380 F.2d 236, 237 (1st Cir.), *cert. denied*, 389 U.S. 975 (1967)).

99. *See supra* note 43.

100. 8 U.S.C. § 1251(a)(2) (1982).

An alien can also voluntarily come into the United States by evading inspection.[101] If intentional and free from official restraint, a crossing at a place other than one designated as a port of entry is clearly an illegal "entry."[102] An alien's technical admissibility at the time of such an illegal "entry" does not save him from being deportable.[103] Moreover, even a temporary evasion of the inspection process will produce an "entry."[104]

Even if an alien is physically present and free of official restraint, he may avoid the consequences of an "entry" if he intends to present himself for inspection (rather than evade it) and follows the ordinary path from the international border to the nearest inspection station.[105] As noted above,[106] such a rule is necessary because most ports of entry are located some distance from the actual territorial boundaries.[107] The question of an alien's intent to report for inspection is a factual one and its resolution often rests on whether the surrounding circumstances suggest that the alien was following the normal route to the nearest inspection station.[108] The alien must not only proceed by the *usual path* to an inspection station; he must also proceed to the *nearest* inspection station. Proceeding to an inspection

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101. *See In re* Pierre, 14 I. & N. Dec. 467 (1973); *see also supra* note 34 and accompanying text.

102. *See* Corona-Palomera v. INS, 661 F.2d 814, 818 (9th Cir. 1981); Fleurinor v. INS, 585 F.2d 129, 131 (5th Cir. 1978); United States v. Martin-Plascencia, 532 F.2d 1316, 1317 (9th Cir.), *cert. denied*, 429 U.S. 894 (1976); *In re* Legaspi, 11 I. & N. Dec. 819, 820 (1966).

103. *In re* Ruis, I.D. No. 2923 (BIA 1982).

104. United States v. Kavazanjian, 623 F.2d 730, 739 n.19 (1st Cir. 1980).

105. Thack v. Zurbrick, 51 F.2d 634, 635 (6th Cir. 1931).

106. *See supra* note 52 and accompanying text.

107. Thack v. Zurbrick, 51 F.2d 634, 635 (6th Cir. 1931).

108. United States *ex rel.* Giacone v. Corsi, 64 F.2d 18, 19 (2d Cir. 1933). For example, in Cheng v. INS, 534 F.2d 1018 (2d Cir. 1976), a group of aliens hidden in a van crossed the Canadian border into the United States. Instead of following the normal route to the nearest inspection station, the van traveled without lights on another road. It was equipped with a device to deactivate the border patrol's vehicle detection apparatus and the driver had been apprehended one week earlier for surreptitiously entering the same way. The court found this to be "overwhelming . . . evidence of actual and intentional evasion of inspection."*Id.* at 1019.

In *In re* Phelisna, 551 F. Supp. 960 (E.D.N.Y. 1983), the court rejected actual intent to evade inspection as an element of "entry." Rather, the court indicated that "[i]t would be enough that the alien had no intention, whether through ignorance or otherwise, to follow the usual path to an inspection station." *Id.* at 963. The court placed on the government the burden of proving that an alien landing at a point far distant from the inspection station intended to submit himself for inspection and was on his way to do so, thus not having made an "entry." *Id.* at 963-64; *cf. In re* Pierre, 14 I. & N. Dec. 467, 468 (1973), which lists "actual and intentional evasion of inspection" as one of the elements of "entry."

station further away in order to obtain more favorable treatment may result in a finding of "entry."[109]

Involuntary Entries

The statutory definition of "entry" provides that an "entry" occurs whether an alien's coming into the United States is "voluntary or otherwise." Early cases, decided before enactment of the 1952 statutory definition of "entry," held that *any* coming of an alien into the country from a foreign port or place constituted an "entry"[110] regardless of any involuntariness. Many of these cases involved aliens whose original entries were illegal and who thereafter departed from the country. The courts invariably held that when such an alien returned to the United States, he made an "entry" even if his departure was unintentional,[111] involuntary[112] or unknowing.[113] When an illegal alien's departure was voluntary rather than involuntary, the courts also consistently concluded that an "entry" had been made.[114]

109. For example, in *In re* Estrada-Betancourt, 12 I. & N. Dec. 191 (1967), a group of aliens had crossed the Rio Grande by boat and landed in the United States approximately twenty miles from Brownsville, Texas, the nearest inspection station. Instead of proceeding toward Brownsville, the aliens traveled ten miles in another direction to an airport where they were taken into custody by Service officers. The Board rejected the Service's position that the aliens had not made an "entry" because, according to their testimony, they intended to present themselves for inspection at Miami, Florida where they expected to receive more favorable treatment as refugees. The Board concluded that expulsion proceedings were appropriate because the aliens, by failing to proceed to the *nearest* inspection station, had effected an "entry." *Id.* at 196. The Board stated that "only utter chaos in enforcement of the immigration laws could result from permitting aliens to proceed to inspection points they believe will best suit their own interest." *Id.*

110. *See supra* text accompanying notes 28-29.

111. *See, e.g.*, Zurbrick v. Borg, 47 F.2d 690 (6th Cir. 1931). In that case, the court held that an alien's trip from New York to Detroit along a train route which passed through Canada subjected him to exclusion upon his attempted re-entry. That the alien had not left the train while in Canada was immaterial to the court, "for, having passed out of the country, he was an immigrant, and, not having an unexpired immigration visa, he was not entitled to re-enter." *Id.* at 691.

112. *See, e.g.*, Taguchi v. Carr, 62 F.2d 307 (9th Cir. 1932). There, an illegal alien had embarked as a crewman on an American vessel, became shipwrecked, and was forced to land on a Mexican island. Noting that it had no discretion in the matter, the court reluctantly rejected the alien's claim that he was not subject to exclusion because he had not intentionally landed on foreign soil. Because the alien was technically coming from a foreign country, he was subject to the immigration laws as if he had never resided in the United States. *Id.* at 308.

113. *See, e.g.*, Ward v. DeBarros, 75 F.2d 34 (1st Cir. 1935). The facts of this case were very similar to those in Zurbrick v. Borg, 47 F.2d 690 (6th Cir. 1931) (discussed *supra* note 111), except that DeBarros had specifically testified that he did not know he was entering a foreign territory. (In *Borg* the court had not mentioned whether the alien lacked such knowledge.) Following the strict interpretation of "entry," the court held that ignorance of the location of the border or of one's presence outside the United States had no effect on the determination of "entry." What the traveller did in fact, not what he knowingly intended to do, was controlling. The court did intimate, however, that had the alien been taken out of the country by force or induced to go out through fraud or deceit, the holding might have been different. *Id.* at 35.

114. *E.g.*, United States *ex rel.* Stapf v. Corsi, 287 U.S. 129 (1932) (voyage to

The alien's return in most of these cases, however, could fairly be characterized as voluntary, making the holdings arguably less harsh than those in cases where the departure and return were both involuntary.

These early cases involving "re-entry" of illegal aliens represent application of the so-called "per se" or "physical passage" doctrine, which emphasizes the *fact* of crossing the border rather than the alien's *intent* or *knowledge* in doing so.[115] Some courts also used this approach in cases where an alien was brought into the country involuntarily for criminal prosecution or imprisonment. According to these courts, the alien's arrival from a foreign country was controlling; the involuntariness of the arrival was irrelevant.[116] Other courts, however, rejected the "per se" doctrine when an alien was brought into the country under official custody.[117] The few recent opinions which discuss this issue agree with the latter position.[118] The conclusion that no "entry" occurs under these circumstances is most consistent with the theory that an alien does not make an "entry" unless he is free from official restraint.[119] It also appears to be the better rule because of the patent injustice in forcing an alien to come into the country and then subjecting him to the consequences of an "entry."

Germany); United States v. Maisel, 183 F.2d 724 (3d Cir. 1950) (voyage to Philippine Islands); Del Castillo v. Carr, 100 F.2d 338 (9th Cir. 1938) (one day trip to Ensenada, Mexico); United States *ex rel.* Roovers v. Kessler, 90 F.2d 327 (5th Cir. 1937) (voyage to various Central American and Caribbean ports); McCandless v. United States *ex rel.* Pantoja, 44 F.2d 786 (3d Cir. 1930) (voyage to Buenos Aires); United States *ex rel.* Drachmos v. Hughes, 26 F. Supp. 192 (D.N.J. 1938), *aff'd*, 110 F.2d 662 (3d Cir. 1940) (pleasure trip to Canada); *In re* O'D—, 3 I. & N. Dec. 632 (1949) (flight to Puerto Rico to avoid criminal prosecution in New York).

115. Recent Cases, *Aliens—Immigration and Naturalization Laws of 1917, 1924 and 1940—Entry*, 16 GEO. WASH. L. REV. 549, 550 (1948).

116. In Blumen v. Haff, 78 F.2d 833 (9th Cir.), *cert. denied*, 296 U.S. 644 (1935), the court held that aliens who were extradited to the United States to answer grand larceny charges had made an "entry" and were subject to expulsion proceedings. *Accord In re* O'D—, 3 I. & N. Dec. 632 (1949).

117. In United States *ex rel.* Ling Yee Suey v. Spar, 149 F.2d 881 (2d Cir. 1945), the court held that aliens who were arrested for rioting on board their ship and brought into the United States for prosecution had not made an "entry." The same court followed this holding in a series of cases involving aliens who were brought into the United States either as war prisoners or for internment as security risks. United States *ex rel.* Bradley v. Watkins, 163 F.2d 328 (2d Cir. 1947); United States *ex rel.* Ludwig v. Watkins, 164 F.2d 456 (2d Cir. 1947); United States *ex rel.* Paetau v. Watkins, 164 F.2d 457 (2d Cir. 1947). *Accord* United States *ex rel.* Camezon v. District Director, 105 F. Supp. 32 (S.D.N.Y. 1952) (alien brought in under custody for prosecution as a stowaway).

118. *See In re* Sanchez, 17 I. & N. Dec. 218 (1980); *In re* Loulos, 16 I. & N. Dec. 34 (1976).

119. *See supra* notes 48-71 and accompanying text.

As noted above, cases decided prior to the enactment of the statutory definition held that an alien who departed from and returned to the United States, whether voluntarily or involuntarily, "re-entered" upon his return.[120] These decisions seem to have current validity for aliens who are not lawful permanent resident aliens, particularly because the words "whether voluntary or otherwise" were included in section 101(a)(13) of the INA.[121] However, as discussed below, the statutory definition of "entry" includes an exception to this language for lawful permanent resident aliens.[122] Because courts and commentators prior to 1952 failed to make a distinction between lawful permanent resident aliens and other aliens in discussing the "voluntariness" issue,[123] and because of extensive judicial interpretation of the statutory exception pertaining to lawful permanent resident aliens,[124] the issue as it relates to these other aliens is somewhat unsettled. Currently, no definitive statement of the courts' position regarding involuntary "entry" by non-lawful permanent resident aliens exists.

The Lawful Permanent Resident Alien Exception

In recent years, lawful permanent resident aliens have received special treatment by Congress and the courts regarding the issue of "entry." Because this was not always so, a review of the historical development of the statutory and judicial rules pertaining to these aliens is necessary to an understanding of the current law in this area.

Historical Foundations

As in the cases noted above involving other aliens,[125] courts prior to 1952 generally adhered to a "per se" interpretation of "entry" when deciding cases involving re-entry of lawful permanent resident aliens. Most of these cases concerned aliens who voluntarily departed from the United States and returned after some period of time.[126]

120. *See supra* notes 110-114 and accompanying text.
121. 8 U.S.C. § 1101(a)(13) (1982).
122. *See infra* notes 138-182 and accompanying text.
123. *See, e.g.*, Gordon, *supra* note 35; Recent Cases, *supra* note 115; Note, *The Meaning of "Entry," supra* note 39.
124. *See infra* notes 138-182 and accompanying text.
125. *See supra* notes 110-124 and accompanying text.
126. *E.g.*, United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933) (brief visit to Cuba); Lewis v. Frick, 233 U.S. 291 (1914) (one day trip to Canada to procure "a woman of immoral purpose"); Lapina v. Williams, 232 U.S. 78 (1914) (three month trip to Russia to visit mother); United States *ex rel.* Schlimmgen v. Jordon, 164 F.2d 633 (7th Cir. 1947) (voyage as seaman on American vessel which visited various foreign ports); United States *ex rel.* Doukas v. Wiley, 160 F.2d 92 (7th Cir. 1947) (short trips to Canada for medical treatment); Zurbrick v. Woodhead, 90 F.2d 991 (6th Cir. 1937) (shopping trip to Canada for a few hours); Canciamilla v. Haff, 64 F.2d 875 (9th Cir. 1933) (two trips to Italy); Jackson v. Zurbrick, 59 F.2d 937 (6th Cir. 1932) (visit to

The courts found an "entry" whenever an alien left the United States and returned from a foreign country, regardless of the purpose or length of his absence. The results were often quite harsh.[127] While most courts followed this strict approach,[128] some indicated that they did so only because they felt bound to follow precedent.[129]

A few courts did eventually adopt a more flexible approach, at least in cases where the lawful permanent resident's departure could be characterized as involuntary or unintentional.[130] The strongest

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Canada for a few hours); United States *ex rel.* Pellegrino v. Karnuth, 23 F. Supp. 688 (W.D.N.Y. 1938) (trip to Italy); United States *ex rel.* Siegel v. Reimer, 23 F. Supp. 643 (S.D.N.Y. 1938) (two-day sightseeing trip to Canada).

127. For example, in United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933), an alien who had been a lawful permanent resident of the United States for nearly twenty years made a brief visit to Cuba. Upon his return he was admitted after inspection but a few years later, the Service sought to deport him for having been convicted of a crime involving moral turpitude (counterfeiting) prior to his "entry." The Supreme Court held that his return from Cuba was an "entry" and could serve as the basis for his deportation even though he would not have been deportable if he had never left the country. Because Volpe's original "entry" took place in 1906, his conviction in 1925, and his trip to Cuba in 1928, he would not have been deportable for the conviction unless his 1928 return to the United States was considered an "entry." *Id.* at 425-26.

128. *See* cases cited *supra* note 126.

129. For example, in Zurbrick v. Woodhead, 90 F.2d 991 (6th Cir. 1937), the alien had been lawfully admitted to the United States in 1924 and remained in the country continuously until 1934 when she went to Canada for a few hours to shop. Two months later she entered a public hospital for treatment of tuberculosis. Because she was unable to pay for this hospital care, the Service sought to deport her for becoming a public charge within five years of "entry." While the court held that her return from the brief shopping trip was an "entry" making her deportable, it expressed deep regret about doing so.

> Once more we are impelled to direct attention to the toll in human anguish which so often follows that literal reading of the Immigration Act by which every departure from the United States, however brief and temporary, and pursuant to no intention to relinquish domicile, constitutes subsequent return a new entry, subjecting the unsuspecting to exclusion or deportation. But the law is clear, and however cruel the result, we have no recourse but protest and recommendation.

Id. See also Comment, *Rosenberg v. Fleuti: Reentry of Aliens Remains Unsettled*, 56 NOTRE DAME LAW. 696, 697 (1981); Note, *A Surreptitious Border Crossing Should Not Be Considered a "Meaningful Interruption" of Permanent Residence Constituting an "Entry" Into the United States Under the Immigration and Nationality Act of 1952*, 6 TEX. S.U.L. REV. 139, 140 (1979).

130. In United States *ex rel.* Valenti v. Karmuth, 1 F. Supp. 370 (N.D.N.Y. 1932), an alien youth was compelled by school authorities to participate in a one-day school outing to Canada. The court held that his return did not constitute an "entry" because his departure and return were not voluntary. It noted that freedom of action was an implied prerequisite for an "entry" to occur. *Id.* at 373. The court in Annello *ex rel.* Annello v. Ward, 8 F. Supp. 797 (D. Mass. 1934), made a more drastic departure from precedent in holding that a brief stop in Canada lasting approximately twenty-five minutes while an alien was in route from one part of the United States to another did not result in an "entry." The court observed that a strict, literal interpretation of "entry"

impetus for excepting involuntary departures from the concept of "entry" for lawful permanent resident aliens came in *Di Pasquale v. Karnuth.*[131] In that case the court held that "the intent of a carrier, unknown to the alien, to carry him across a border and back again, upon a route whose termini are within the United States, should not be imputed to him."[132] The court drew upon what it believed to be the legislative intent behind the deportation laws in reaching this conclusion, stating that it could not believe "that Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous."[133] It went on to observe that while "we should be free to rid ourselves of those who abuse our hospitality . . . it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards."[134]

The Supreme Court adopted the *Di Pasquale* court's reasoning in *Delgadillo v. Carmichael,*[135] where the circumstances of war and not the alien's voluntary act had caused him to be on foreign soil. The Court concluded that Congress could not have meant to subject an alien to the consequences of an "entry" under such "fortuitous and capricious" circumstances.[136] Lower courts followed this approach in subsequent cases.[137]

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leads to absurd and unjust results and concluded that "one who is lawfully within the country and who goes into a foreign contiguous territory during the course of a practically continuous journey originating and ending within the United States" does not make an "entry." *Id.* at 798. The opinion, however, does not specifically discuss the voluntariness of the departure.

131. 158 F.2d 878 (2d Cir. 1947) (Hand, J.).

132. *Id.* at 879. While the alien slept, the train on which he rode, unknown to him, passed through Canada on its way from Buffalo to Detroit. Judge Hand wrote the opinion for the court, holding that the alien could not be deported for conviction of a crime involving moral turpitude committed within one year after this trip. *Compare* Ward v. DeBarros, 75 F.2d 34 (1st Cir. 1935); Zurbrick v. Borg, 47 F.2d 690 (6th Cir. 1931) (similar facts except that the alien involved was illegal rather than legal.) *See supra* notes 110-113 and accompanying text.

133. 158 F.2d at 879.

134. *Id.* For an early analysis of this case, *see* Recent Cases, *Aliens—Immigration Acts of 1917 and 1924—Lawful and Unlawful Entry*, 15 GEO. WASH. L. REV. 480 (1947).

135. 332 U.S. 388 (1947). The alien in *Delgadillo* had served on an American merchant ship during World War II. The ship was torpedoed off the coast of Cuba after which the alien was rescued and taken to Cuba. One week later he returned to the United States. Two years after this event, the alien was convicted of robbery and the government sought to deport him. The Court, however, found that no "entry" had been made as a result of the alien's return from Cuba. *Id.* at 391.

136. *Id.* For an analysis of this case, see Recent Cases, *supra* note 115.

137. *E.g.*, Schoeps v. Carmichael, 177 F.2d 391, 396 (9th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950) (voluntary visit to Mexico); Carmichael v. Delaney, 170 F.2d 239, 242 (9th Cir. 1948) (service on a Navy ship); Yukio Chai v. Bonham, 165 F.2d 207, 208 (9th Cir. 1947) (unscheduled stop by vessel in Canada).

The Statutory Exception

When revising the immigration laws in 1952, Congress included the judicial developments of *Di Pasquale* and *Delgadillo* in the definition of "entry."[138] The statute provides that a lawful permanent resident alien will not be regarded as making an "entry" if he can prove to the Attorney General's satisfaction that (1) his departure was *unintended* or not reasonably foreseeable or (2) his presence in a foreign country was *not voluntary*.[139]

During the first decade after enactment of the statutory definition, courts continued to decide cases involving re-entry of lawful permanent resident aliens by considering the voluntariness of the departure. If a court found that an alien's departure or presence in a foreign country was voluntary, it concluded that an "entry" had been made.[140] Conversely, if it found that the departure or presence was unintentional or involuntary, it concluded that no "entry" had been made.[141] The rule under the statutory definition that an alien does not make an "entry" when his presence in a foreign country is *not voluntary* remains unchanged.[142] However, those cases interpreting the portion of the definition dealing with *intent* to depart have generally been superseded by the relatively recent judicial developments discussed below.

The Fleuti Doctrine

In 1963 the Supreme Court drastically altered the meaning of the statutory phrase, "not intended," in the landmark case of *Rosenberg v. Fleuti*.[143] In that case, the Court acknowledged that the alien had

138. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 32, *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1684. *See* Griffith, *Deportation and the Alien—Some Aspects*, 25 DRAKE L. REV. 329, 345 (1975).

139. 8 U.S.C. § 1101(a)(13) (1982). See *supra* text accompanying note 32 for the exact wording of the statute.

140. *E.g.*, Bonetti v. Rogers, 356 U.S. 691 (1958); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Pimental-Navarro v. Del Guercio, 256 F.2d 877 (9th Cir. 1958); Resurreccion-Talavera v. Barber, 231 F.2d 524 (9th Cir. 1956): United States *ex rel.* Belfrage v. Kenton, 224 F.2d 803 (2d Cir. 1955); United States *ex rel.* Circella v. Sahli, 216 F.2d 33 (7th Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); *In re* P—, 4 I. & N. Dec. 235 (1951).

141. *See* Savoretti v. United States *ex rel.* Pincus, 214 F.2d 314 (5th Cir. 1954); *In re* J—M—D—, 7 I. & N. Dec. 105 (1956).

142. *See, e.g., In re* Farmer, 14 I. & N. Dec. 737, 738 (1974) (impaired mental capacity renders departure unintended and presence in foreign country involuntary). *See also* D. UNGAR, THE CHANGING PICTURE OF IMMIGRATION LAW 69 (C.E.B. Program Materials 1980).

143. 374 U.S. 449 (1963). Fleuti, a lawful permanent resident alien admitted to

voluntarily been present in a foreign country. Nevertheless, it went beyond the literal meaning of the term "not intended" as used in the statute[144] to hold that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return."[145] The Court reasoned that Congress included the exception clause in the definition of "entry" because it wished to ameliorate the harsh consequences of the "per se" doctrine for lawful permanent resident aliens.[146] It construed the intent exception of section 101(a)(13) to mean an "intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence."[147]

To aid lower courts in determining whether a departure was "meaningfully interruptive," the Court enumerated three factors which might be considered.

> One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country.[148]

The Court also suggested that other relevant factors might be devel-

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the United States in 1952, visited Mexico for a few hours in 1956 and was readmitted upon his return. In 1959 the Service sought to deport him under section 241(a)(1) of the INA (8 U.S.C. § 1251(a)(1) (1982)) as an alien who was a member of an excludable class at the time of "entry." The Service alleged that Fleuti, as a homosexual, was afflicted with a psychopathic personality and was therefore excludable at the time of "entry" under section 212(a)(4) of the INA (8 U.S.C. § 1182(a)(4) (1982)). The Court did not reach Fleuti's constitutional attack on the application of the statute because it was able to decide the case on the basis of statutory construction. 374 U.S. at 451.

144. *See* Griffith, *supra* note 138, at 357-58.

145. 374 U.S. at 462.

146. *Id.* at 458. The Court recognized that the legislative history of the statute referred only to the decisions of Di Pasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947), and Delgadillo v. Carmichael, 332 U.S. 388 (1947), (*see supra* notes 131-136 and accompanying text) and that there was "no indication one way or the other . . . of what Congress thought about the problem of resident aliens who leave the country for insignificantly short periods of time." 374 U.S. at 458. Nevertheless, it expressed the opinion that Congress had not intended the ameliorative effects of the exception language to be limited to the facts of those two cases. *Id.* The four dissenters in *Fleuti* argued that the language of the statute was perfectly clear in that the exception pertained only to involuntary or unintentional departures. They accused the majority of rewriting the definition (something Congress had declined to do) to exclude a permanent resident alien's return from a brief but voluntary and intentional trip abroad, although this was not Congress' expressed intention and, in fact, was directly contrary to the Court's earlier holding in Bonetti v. Rogers, 356 U.S. 691, 698 (1958). 374 U.S. at 467-68 (Clark, J., dissenting).

147. 374 U.S. at 462.

148. *Id.*

oped "by the gradual process of judicial inclusion and exclusion."[149]

Application of the *Fleuti* Doctrine

The overwhelming majority of recent decisions concerning the subject of "entry" in immigration law have focused on application of these "*Fleuti* factors" and development of additional factors to determine if a lawful permanent resident alien has made an "entry" upon returning from a trip abroad.[150] The determination of meaningful interruption is a question of fact,[151] and the conclusions drawn by various courts are often difficult, if not impossible, to reconcile.

Courts have used various approaches to this problem, placing varying amounts of emphasis on one factor or another. In almost every case, however, the court discusses the "purpose of the visit" factor.[152]

The Supreme Court in *Fleuti* spoke of both the "purpose of the visit" and the "purpose of leaving."[153] This raises the question of whether the time of formation of the purpose is relevant to a determination of meaningful interruption. In some cases, courts have held that the timing of formation of the purpose is irrelevant and that any unlawful purpose, whether formed prior to departure from the United States or after arrival in the foreign country, may serve as the basis for a finding of meaningful interruption.[154] Other courts, however, have held that the unlawful purpose must be formed prior to or at the time of departure; if an alien leaves the United States for an innocent purpose but becomes involved in illegal activity while in the foreign country, his residence is not necessarily meaningfully interrupted.[155]

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149. *Id.* (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877)).

150. For a general discussion of the *Fleuti* doctrine, see Comment, *supra* note 129; Griffith, *supra* note 138.

151. Wadman v. INS, 329 F.2d 812, 816 (9th Cir. 1964).

152. *See* Comment, *supra* note 129, at 700; Recent Decisions, *Immigration—Entry—Resident Alien Who Makes Brief Visit Outside the Country is Deportable if He Reenters United States at an Unauthorized Location While Aiding Illegal Aliens to Enter*, 11 VAND. J. OF TRANSNAT'L L. 535, 539 (1978). *Contra In re* Janati-Ataie, 14 I. & N. Dec. 216, 224 (1972).

153. *See supra* text accompanying note 148.

154. *E.g.*, Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974); Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974). *Accord* Cuevas-Cuevas v. INS, 523 F.2d 883 (9th Cir. 1975). The accuracy of this interpretation of the *Fleuti* "purpose factor" is questioned in Griffith, *supra* note 138, at 357. *But see* Comment, *supra* note 129, at 700, (suggests that the time of formation of the unlawful purpose should be irrelevant).

155. *E.g.*, Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972). *Cf.* Laredo-Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977) (unlawful purpose formed after departure accompanied by surreptitious return).

Courts also disagree about the relevance of successful accomplishment of the alien's purpose, whenever it is formed. One court has held in effect that if the alien fails to accomplish his purpose, he does not make an "entry" when he returns from a foreign country.[156] Another has held that if the purpose is accomplished either before or after the alien returns to the United States, he makes an "entry."[157] Because the Court in *Fleuti* listed the purpose of the visit as a factor and not the successful accomplishment of that purpose, actual accomplishment should be irrelevant to whether a departure is meaningfully interruptive.[158]

Except for these two points of disagreement, when an alien's purpose in unlawful or "contrary to some policy reflected in our immigration laws,"[159] courts will usually find that an alien's departure was intended to be meaningfully interruptive of his residence. This demonstrates the emphasis that has been placed on the purpose factor.[160] For example, courts have found that where a permanent resident alien participates in alien smuggling,[161] drug smuggling,[162] counterfeiting,[163] immigration fraud,[164] or false claim of citizen-

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156. In Yanez-Jacquez v. INS, 440 F.2d 701 (5th Cir. 1971), an alien had left the United States and traveled into Mexico in order to avenge an assault and robbery committed on him in Mexico the previous day. He returned to the United States without having accomplished his goal. The court held that the record was insufficient to show that the alien's return constituted an entry. *Id.* at 704.

157. In Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir.), *cert. denied*, 434 U.S. 853 (1977), an alien who departed from the country was unsuccessful in carrying out a meeting in Mexico intended to further a plan to smuggle other aliens into the United States. He was, however, successful in carrying out his part in the smuggling plan *after* his return to the United States. The court, finding that Longoria-Castenada had made an "entry," attempted to reconcile its decision with that of Yanez-Jacquez v. INS, 440 F.2d 701 (5th Cir. 1971)(discussed *supra* note 156), by pointing out that in the latter case, the alien had not committed a crime in either the United States or Mexico; Longoria-Castenada, however, had succeeded in carrying out his unlawful purpose for departing from the country, even though this success was achieved after he had returned to the United States. 548 F.2d at 237. This distinction seems rather strained.

158. *See* Griffith, *supra* note 138, at 356.

159. *See supra* text accompanying note 148.

160. Although we recognize that the reason for departing the country is only one of several major factors which should be considered in determining whether a departure is a meaningful interruption of residence, we conclude that this one factor, standing alone, can be deemed sufficient to warrant a finding that a meaningful interruption of residence has occurred.

In re Valdovinas, 14 I. & N. Dec. 438, 440 (1973).

161. *See, e.g.*, Laredo-Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977); Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir.), *cert. denied*, 434 U.S. 853 (1977); Cuevas-Cuevas v. INS, 523 F.2d 883 (9th Cir. 1975); Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); Solis-Davila v. INS, 456 F.2d 424 (5th Cir. 1972); *In re* Contreras, I.D. No. 2859 (BIA 1981); *In re* Valdovinas, 14 I. & N. Dec. 438 (1973); *In re* Payan, 14 I. & N. Dec. 58 (1972); *In re* Valencia-Barajas, 13 I. & N. Dec. 369 (1969).

162. *See, e.g.*, Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974).

163. *See, e.g.*, Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974).

164. *See, e.g.*, *In re* Leal, 15 I. & N. Dec. 477 (1975).

ship[165] in connection with a departure from and return to the United States, he has made an "entry" because his residence has been meaningfully interrupted.[166] Where an alien's purpose in leaving the United States is lawful,[167] courts will usually consider the other factors enumerated in *Fleuti* or additional factors not enumerated but considered pertinent to the issue of meaningful interruption.[168]

The Court in *Fleuti* listed the length of an alien's absence from the country as a factor to be considered.[169] However, no particular length of time is by itself determinative of a meaningful interruption. If the purpose of the trip was unlawful, almost any length of absence will be sufficient to lead to a finding of "entry."[170] If the purpose was lawful, an absence of only a few hours or days will probably be held to be "innocent, casual, and brief" and therefore not meaningfully interruptive.[171] If the length of the alien's absence is a month or more, his return will likely be considered an "entry."[172] A length of absence which falls between these two guidelines will probably yield in importance to other factors the court may wish to consider.[173]

Rarely is procurement of travel documents decisive in determining

165. *See, e.g.*, Bufalino v. INS, 473 F.2d 728 (3d Cir.), *cert. denied*, 412 U.S. 928 (1973) (but consideration under *Fleuti* is of questionable validity because the alien was not a lawful permanent resident); *In re* Kolk, 11 I. & N. Dec. 103 (1965).

166. Courts do not necessarily require that the criminal activity be in violation of *immigration* law, in terms of the movement of aliens across the border, in order to be "contrary to some policy reflected in our immigration laws." Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963). *See* cases cited *supra* notes 162-163.

167. *See, e.g.*, Maldonado-Sandoval v. INS, 518 F.2d 278 (9th Cir. 1975) (personal business); Munoz-Casarez v. INS, 511 F.2d 947 (9th Cir. 1975) (visitation of relatives); Itzcovitz v. Selective Service, 447 F.2d 888 (2d Cir. 1971) (business training); Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir.), *cert. denied*, 381 U.S. 925 (1965) (vacation).

168. Of course, these factors may also be considered when the court finds that the alien's purpose is unlawful.

169. *See supra* text accompanying note 148.

170. *See, e.g.*, Laredo-Miranda v. INS, 555 F.2d 1242, 1243 (5th Cir. 1977) (less than one day); Longoria-Castenada v. INS, 548 F.2d 233, 235 (8th Cir), *cert. denied*, 434 U.S. 853 (1977) (a few hours); Cuevas-Cuevas v. INS, 523 F.2d 883, 884 (9th Cir. 1975) (12 days); Palatian v. INS, 502 F.2d 1091, 1092 (9th Cir. 1974) (two and one half days).

171. 374 U.S. at 462. *See, e.g.*, Maldonado-Sandoval v. INS, 518 F.2d 278, 279 (9th Cir. 1975) (two or three days); *In re* Cardenas-Pinedo, 10 I. & N. Dec. 341, 342 (1963) (a few hours).

172. *See, e.g.*, Munoz-Casarez v. INS, 511 F.2d 947, 948 (9th Cir. 1975) (30 days); Lozano-Giron v. INS, 506 F.2d 1073, 1078 (7th Cir. 1974) (27 days); *In re* Janati-Ataie, 14 I. & N. Dec. 216, 217 (1972) (30 days); *In re* Abi-Rached, 10 I. & N. Dec. 551, 551 (1964) (one month); *In re* Guimaraes, 10 I. & N. Dec. 529, 529 (1964) (one month).

173. *See, e.g.*, Itzcovitz v. Selective Service, 447 F.2d 893, 893-94 (2d Cir. 1971) (three weeks but purpose was to fulfill a requirement of the alien's employer).

whether a departure and return constitutes an "entry," but it may add weight to other factors indicating "entry."[174] Most cases which discuss procurement of travel documents refer to the likelihood that the alien will be prompted to consider the implications of leaving the country, as suggested in *Fleuti*.[175]

Some courts have considered other factors not enumerated in *Fleuti*. Examples include the distance from the United States that an alien travels[176] and the alien's minority at the time of his departure.[177]

One court indicated that it would consider certain additional factors relevant to the hardship an alien is likely to suffer if deported.[178] These factors include "how long the alien had been a permanent resident of the United States, whether he had a wife and children living with him, whether he owned a business establishment . . . in the United States, the nature of the environment to which he would be deported, and his relation to that environment."[179] Although these considerations clearly bear on the hardship which an alien might suffer if deported, their relevance to meaningful interruption is questionable. The issue of "entry" deals in part with whether one is deportable;[180] other immigration law provisions set forth avenues of discretionary or mandatory relief from the hardship of deportation.[181]

Courts disagree regarding whether an alien's subjective intent to resume residence in the United States after his trip abroad is perti-

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174. Very few cases even mention this factor. *E.g.*, Lozano-Giron v. INS, 506 F.2d 1073, 1079 n.25 (7th Cir. 1974); Bilbao-Bastida v. INS, 409 F.2d 820, 823 (9th Cir.), *cert. denied*, 396 U.S. 802 (1969); *In re* Guimaraes, 10 I. & N. Dec. 529, 532 (1964); *In re* Janati-Ataie, 14 I. & N. Dec. 216, 224 (1972).

175. *See supra* text accompanying note 148. However, in a case involving the issue of continuous physical presence (*see infra* text accompanying notes 183-191), one court indicated that procurement of travel documents for a trip may undercut rather than support the conclusion that an alien's absence was meaningfully interruptive, especially if the documents were obtained with the expectation that they would confirm continuity of presence. Kamheangpatiyooth v. INS, 597 F.2d 1253, 1259 (9th Cir. 1979).

176. *In re* Janati-Ataie, 14 I. & N. Dec. 216, 225 (1972).

177. Toon-Ming Wong v. INS, 363 F.2d 234, 236 (9th Cir. 1966).

178. Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974).

179. *Id.* at 1077-78. *See also* Zimmerman v. Lehmann, 339 F.2d 943, 948-49 (7th Cir.), *cert. denied*, 381 U.S. 925 (1965).

180. *See supra* notes 20-24 and accompanying text.

181. *E.g.*, 8 U.S.C. §§ 1252(e) (discretionary suspension of deportation), 1253(h) (stay of deportation) (1982). Indeed, in Longoria-Castenada v. INS, 548 F.2d 233, 237-38 (8th Cir.), *cert. denied*, 434 U.S. 853 (1977), the court, while recognizing the hardship of uprooting a long-time resident, indicated that the factors outlined in Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974) (*see supra* notes 178-179 and accompanying text) were more properly considered in connection with application for discretionary administrative relief. *Accord* Palatian v. INS, 502 F.2d 1091, 1094 (9th Cir. 1974) (rejecting the nature of the environment to which the alien will be deported as a factor for consideration).

nent to the issue of meaningful interruption.[182] The position taken by those courts rejecting it as a factor seems better reasoned because consideration of an alien's intent to resume his residence does not aid in the determination of whether his departure was meaningfully interruptive. As used by the Supreme Court in *Fleuti*, the terms "intent" and "meaningful interruption" are synonymous. To say that an alien intended to resume his residence is the equivalent of saying that he did not intend to interrupt his residence. This factor therefore seems to be more of a conclusion than a consideration.

Application of the *Fleuti* Doctrine to the Issue of Continuous Physical Presence

The *Fleuti* doctrine has had a far-reaching effect in suspension of deportation cases. Section 244(a) of the INA[183] allows the Attorney General to suspend deportation and adjust a qualifying deportable alien's status to that of an alien lawfully admitted for permanent residence. Such an alien must have been physically present in the United States for a continuous period of not less than seven years; he must be of good moral character; and it must be evident that his deportation would result in extreme hardship to himself or his family.[184] The federal courts of appeal have adopted the *Fleuti* doctrine of meaningful interruption as the test for determining "continuous physical presence" under this section.

In 1964, the Ninth Circuit Court of Appeals first applied the "meaningful interruption" standard to this issue,[185] although the Supreme Court in *Fleuti* had considered "entry" rather than "continuous physical presence." The Ninth Circuit reasoned that "continuous" was as fluid a concept as "intended." It indicated that "[t]he question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guidelines laid down in *Fleuti*."[186]

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182. The Second Circuit Court of Appeals and the Fifth Circuit Court of Appeals have treated it as relevant. Itzcovitz v. Selective Service, 447 F.2d 888, 894 (2d Cir. 1971); Yanez-Jacquez v. INS, 440 F.2d 701, 704 (5th Cir. 1971). However, the Ninth Circuit Court of Appeals and the Board of Immigration Appeals have consistently rejected it as a consideration. Munoz-Casarez v. INS, 511 F.2d 947, 949 (9th Cir. 1975); *In re* Janati-Ataie, 14 I. & N. Dec. 216, 224-25 (1972); *In re* Kolk, 11 I. & N. Dec. 103, 105 (1965); *In re* Abi-Rached, 10 I. & N. Dec. 551, 553 (1964); *In re* Guimaraes, 10 I. & N. Dec. 529, 531 (1964).

183. 8 U.S.C. § 1254(a) (1982).

184. *Id.*

185. Wadman v. INS, 329 F.2d 812 (9th Cir. 1964).

186. *Id.* at 816.

Courts originally applied the *Fleuti* factors to the question of continuous physical presence in much the same way as they applied them to the question of "entry."[187] However, in recent years the Ninth Circuit has liberalized its approach by holding that the factors outlined in *Fleuti* for determining meaningful interruption are only evidentiary and not conclusive.[188] It reformulated the standard, holding that the court must determine "whether a particular absence during the seven-year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion."[189]

The Eleventh Circuit Court of Appeals, however, has rejected this formulation and retained the *Fleuti* factors as the test for "continuous physical presence."[190] The Supreme Court has granted certiorari in the most recent Ninth Circuit case on this issue.[191] The Court's decision should resolve the conflict among the circuits and may clarify the confusion surrounding the *Fleuti* "re-entry" definition.

Application of the *Fleuti* Doctrine in Other Contexts

The exception clause of section 101(a)(13), which the Supreme Court interpreted in *Fleuti*, expressly pertains only to lawful permanent resident aliens.[192] Nevertheless, courts have discussed *Fleuti* in cases where the alien does not have lawful permanent resident status.

A difficult question concerning the applicability of *Fleuti* arises when an alien has unlawfully secured his permanent resident status. Courts which have considered this issue agree that *Fleuti* should be applied to the departure and return of all aliens who have been granted permanent resident status.[193] The proper forum for adjudicating the lawfulness of the alien's original admission is a deportation hearing; the alien cannot be excluded on the basis of the questioned original "entry" when he makes an innocent, casual, and brief

187. *See* Heitland v. INS, 551 F.2d 495, 500-04 (2d Cir.), *cert. denied*, 434 U.S. 819 (1977); Barragan-Sanchez v. Rosenberg, 471 F.2d 758, 760-61 (9th Cir. 1972); Git Foo Wong v. INS, 358 F.2d 151, 152-54 (9th Cir. 1966); *In re* Salazar, 17 I. & N. Dec. 167, 169 (1979).

188. Kamheangpatiyooth v. INS, 597 F.2d 1253, 1257-58 (9th Cir. 1979).

189. *Id. Accord* Sida v. INS, 665 F.2d 851 (9th Cir. 1981); deGallardo v. INS, 624 F.2d 85 (9th Cir. 1980); *In re* Herrera, I.D. No. 2853 (BIA 1981).

190. Fidalgo-Velez v. INS, 697 F.2d 1026 (11th Cir. 1983). The court reasoned that Congress intended the words "continuous physical presence" to be literally interpreted because the word "presence" rather than "residence" was used in the statute. *Id.* at 1029.

191. Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981), *cert. granted*, 103 S. Ct. 291 (1982).

192. *See supra* text accompanying note 32.

193. Maldonado-Sandoval v. INS, 518 F.2d 278, 281 (9th Cir. 1975); *In re* Rangel, 15 I. & N. Dec. 789, 790-92 (1976).

excursion outside the United States.[194]

Most courts have held that *Fleuti* is not applicable in the case of an alien who has never been granted permanent resident status.[195] However, at least one court has discussed *Fleuti* in connection with the claims of an alien who was admittedly present in the United States illegally.[196] That court determined that *Fleuti* provided no relief to the alien, not because application of *Fleuti* was improper, but because the alien's departure had not been innocent, brief, or casual. The outcome of the case was therefore the same as if *Fleuti* had not been applied. Nevertheless, because *Fleuti* and the statutory exception pertain only to lawful permanent resident aliens, this discussion by the court seems inappropriate and could lead to further confusion of the *Fleuti* doctrine.

The Exception to the Exception—Departure Due to Legal Process

The last clause of the statutory definition of "entry" indicates that a lawful permanent resident alien whose departure from the United States was due to deportation, extradition or other legal process is not entitled to the benefit of the unintentional/involuntary exception to the definition of "entry."[197] Because this exception is not available to such an alien, the benefits of *Fleuti* are also not available to him.[198] When an alien crosses into a foreign country, either voluntarily or involuntarily, because of legal proceedings against him there, his subsequent return to the United States is an "entry," whether he is a lawful permanent resident alien or not.

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194. *Id.*

195. *See* Martinez-Martinez v. INS, 480 F.2d 117, 118 (5th Cir.), *cert. denied*, 414 U.S. 1066 (1973); *In re* Legaspi, 11 I. & N. Dec. 819 (1966).

196. Bufalino v. INS, 473 F.2d 728, 730 (3d Cir.), *cert. denied*, 412 U.S. 928 (1973).

197. *See supra* text accompanying note 32.

198. In *In re* Caudillo-Villalobos, 11 I. & N. Dec. 15 (1965), *aff'd sub nom.* Caudillo-Villalobos V. INS, 361 F.2d 329 (5th Cir. 1966), the Board held that an alien's weekly trips to Mexico to sign a bond book in the office of a court clerk while his appeal from a criminal conviction there was pending resulted in an "entry" each time he returned to the United States. *Id.* at 20. If his departures had not been occasioned by legal process in Mexico, his returns might not have been considered "entries" under *Fleuti*, despite the frequency of his trips. *Accord In re* Acosta, 14 I. & N. Dec. 666 (1974). In *In re* Wood, 12 I. & N. Dec. 170 (1967), the Board found that an alien who twice voluntarily appeared in a Canadian court to answer criminal charges was held to the consequences of an "entry" upon each of his returns to the United States. The Board in that case, however, did not refer to the statutory provision relating to legal process. Instead, it reached its conclusions by applying the *Fleuti* test and determining that the alien's departures were not innocent, casual, and brief excursions. Nevertheless, the results were the same as if the legal process language had been applied.

CONCLUSION

The issue of "entry" in immigration law is multifaceted. Its resolution determines an alien's rights and liabilities in numerous contexts. The seemingly straightforward language of the statutory definition of "entry" has been construed to mean much more than the words facially might suggest. This is particularly true regarding the exception in the definition pertaining to unintentional and involuntary departures by lawful permanent resident aliens. The evolution of the current judicial interpretation of the statute has followed a path described by a commentator nearly forty years ago.

> [P]rogress in statutory interpretation is from language to fact. The courts' first tendency is to look at the barren word and to define it unimaginatively; as the statute is used more and more (and perhaps as experience demonstrates that hard cases are made by the bad law of the early interpretation) the courts look less at the barren word and more at the facts—the milieu in which the statute is to be applied. This development is apparent in the courts' handling of the word "entry" in the federal immigration law.[199]

This Comment has set forth the current state of the law on the issue of "entry." As with every significant legal issue, though, one must question the validity of distinctions which are based on a determination such as "entry." For example, an alien who circumvents immigration laws and "enters" the country illegally is given greater procedural rights than an alien who applies for admission through legal channels and is paroled into the country pending determination of his right to "enter." It might appear that this system rewards the illegal entrant and penalizes the non-entrant applicant. But it also appears that, in many cases, the entrant has more to lose than the non-entrant if he is ordered to leave the country. The substantive consequences of "entry" may outweigh the procedural advantages available to the entrant. When viewed this way, the "entry" distinction seems to have some validity.

Other difficult questions arise regarding "re-entry" of lawful permanent resident aliens. Should courts even consider the "entry" issue except in cases dealing with original "entries"? Should a lawful permanent resident alien be deportable simply because he has left the country and returned? The activity which provides the underlying basis for deportation is often present whether he leaves the United States or not; yet, only if he "re-enters" upon his return may he be deported. Perhaps the law is intended to allow us to expel at least some aliens considered undesirable even though we have no basis for deporting others who are equally undesirable. But should the decisive factor be "entry" or should it be the alien's undesirable activity?

These and other difficult questions may be worthy of consideration

199. Note, *Meaning of "Entry," supra* note 39, at 265.

in any case where the issue of "entry" arises. Perhaps with the growing concern about our immigration laws, Congress and the courts will re-examine the substantive basis for the technical rules which have been developed to determine "entry" and an alien's resulting rights and liabilities.

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